IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2006

MICHAEL HILL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Bradley County
No. M-05-143 R. Steven Bebb, Judge

No. E2006-00214-CCA-R3-PC - Filed June 30, 2006

The petitioner, Michael Hill, appeals the Bradley County Criminal Court's dismissal of his petition for post-conviction relief from his convictions for three counts of rape, a Class B felony, and effective sentence of twelve years in the Department of Correction. On appeal, the petitioner contends that he received the ineffective assistance of counsel, rendering his guilty pleas unknowing and involuntary. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Richard Hughes, District Public Defender, for the appellant, Michael Hill.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Jerry N. Estes, District Attorney General, and John O. Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from the petitioner's convictions for rapes committed against his step-daughter. A Bradley County grand jury indicted the petitioner on one count of rape of a child, a Class A felony, and two counts of rape, a Class B felony. Pursuant to a plea agreement, the petitioner entered guilty pleas on November 17, 2004, to three counts of rape. The trial court sentenced the petitioner to an effective sentence of twelve years to be served as a violent offender in prison.

On April 1, 2005, the petitioner filed a pro se petition for post-conviction relief alleging that he received the ineffective assistance of counsel, that his guilty pleas were involuntary and unknowing, and that his conviction was obtained in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The trial court appointed counsel, who filed an amended petition for

post-conviction relief alleging that the petitioner received the ineffective assistance of counsel, rendering his guilty pleas unknowing and involuntary because (1) his trial counsel failed to prepare adequately for trial, (2) his counsel failed to advise him adequately about the elements of the three indicted offenses, and (3) his counsel pressured him into pleading guilty because the petitioner had "no confidence that trial counsel was willing and prepared to vigorously represent him at trial."

At the post-conviction hearing, the petitioner testified that he hired his attorney in October 2003 to represent him in a divorce case against his then-wife, Jeanette Hill, and that the grand jury indicted him on the rape charges in January 2004. He said he hired the same attorney to represent him on the criminal charges. He said that he was on bond until he entered his guilty pleas in November 2004 and that he met with his attorney approximately twelve times. He said that his ex-wife and other witnesses testified at his divorce trial regarding his step-daughter's allegations and that his attorney "questioned them some, but he didn't have a defense." He said that during the meetings, he would give his attorney information that would help the case but that his attorney would not listen to him. He acknowledged that his attorney went over witness statements with him, including statements by his step-daughter, his ex-wife, and the pastor in his ex-wife's church. He also acknowledged that his attorney went over the statement with him that the petitioner made to Detective Scoggins.

The petitioner testified that before he entered the pleas, he never expressed an interest in entering guilty pleas to his attorney. He said that his attorney first talked to him about entering pleas several weeks before the trial date and that his attorney advised him to accept the plea offer. He said that the night before he entered his pleas, his attorney met with him, his mother, his two brothers, and his friend. He said that he signed and initialed documents given to him by his attorney but that he did not read them.

The petitioner testified that he did not insist on going to trial, despite the fact that a jury had been called in, because his attorney had not prepared him for trial and he "didn't know what else to do." He acknowledged that when he entered the pleas, the trial court asked if he was pleased with his attorney and that he answered affirmatively. He said his attorney never explained the elements of the offenses or the lesser included offenses to him. He said that he entered the guilty pleas because he did not know that he could fire his attorney but that he wanted to fire his attorney because he had not prepared him for trial. He said that approximately one week after he entered his pleas, he contacted his attorney and told his attorney "it just wasn't right, you know, that I should have went to trial." He said his attorney told him, "You can file a post-conviction on it."

On cross-examination, the petitioner acknowledged that he was under oath during the plea hearing and that he told the trial court that his attorney was prepared and that he had no complaints about him. He said he "went along with whatever [his attorney] said." He said that his family listened to the tape of his statement and recommended he take the plea offer but that they did not know anything about the law. He acknowledged testifying in a deposition for his divorce case and being cross-examined. He acknowledged that his attorney believed he was not a good witness. He acknowledged he had some experience with the criminal justice system because he had been

investigated "a few times" for rape allegations. He acknowledged that in addition to the twelve times he met with his attorney to talk about the criminal case, he also met with his attorney to discuss the divorce case and that the cases involved the same issues because the rapes were the basis for the divorce. He acknowledged telling Detective Scoggins that he raped his step-daughter but said that the statement was not true.

Nora Asalee Hill, the petitioner's mother, testified that the night before her son's trial date, she and her other two sons met with the petitioner's attorney. She said the petitioner's attorney hugged the petitioner and kept insisting that the petitioner plead guilty. She said the petitioner "got rattled, he didn't understand, he didn't know. His response, he finally said, 'Okay, I will plead guilty.'" On cross-examination, Ms. Hill denied that she recommended to the petitioner that he plead guilty and said that she "just went along with the rest of them whenever they said that."

The attorney testified that he had been an attorney for seventeen years, that he had been in the Navy Judge Advocate General's Corps, that he had worked for the district attorney's office, and that he began his own practice doing mostly criminal defense work in 1994. He said he had handled many sexual assault cases. He said he first became involved with the petitioner in October or November 2003, when the petitioner came to his office to speak to him about a statement the petitioner had made to law enforcement about conduct occurring between him and his step-daughter. He said that he met the petitioner "more times than I can really count and . . . from October of 2003 till this case was concluded in November [2004], I bet there was not a week that went by where I did not see [the petitioner] or have telephone contact with him on a very frequent basis." He said he believed the petitioner had a "great deal of difficulty in understanding the seriousness of the conduct that he had at least admitted to."

The attorney testified that he prepared the divorce case and criminal case and that he was grateful to have the divorce case because it allowed him access to extensive discovery. He said he did not file a motion for a bill of particulars because it would have alerted the court and the state that the petitioner should have been charged with two additional counts of rape of a child. He said he did file and argue a motion to suppress the petitioner's statement to Detective Scoggins. He said that he had deposed the petitioner's ex-wife for the divorce case and that one strategy in the criminal case was to discredit the ex-wife. He said the petitioner did not want him to "attack" his ex-wife, because he believed they would reconcile.

The attorney testified that he met with a private investigator and obtained the victim's school records and that the records did not reveal any problems. He said that the petitioner gave him a list of witnesses on three occasions and that he attempted to call the witnesses at least twice while the petitioner was present. He said some of the witnesses did not want to be involved when they heard the petitioner was accused of molesting his step-daughter. He said the petitioner had written incriminating letters to his ex-wife, which would have been used by the prosecution in this case.

The attorney testified that during the divorce case, the petitioner "testified so abysmally . . . was so disconnected with reality," that he knew they would have to win the criminal case through

cross-examination. He said that during the summer, he realized the petitioner "wasn't playing with a full deck" and had him evaluated. He said the state's forensic interviewers found the petitioner was "perfectly sane." He said he also sent the petitioner to a psychiatrist, Dr. Billard, to determine if there was a psychiatric defense. He said that he and Dr. Billard met with the petitioner three times and determined that petitioner's desire to go to trial was "tantamount to suicide" but that he did not stop preparing for the case. He said he did go through the charges with the petitioner during the weeks before the trial date. He said he and his partner went through the depositions of the witnesses with the petitioner.

The attorney testified that on March 9, 2004, he received a twenty-year offer from the state but that the petitioner rejected it. He said that on September 24, 2004, the state offered the petitioner a fifteen-year sentence, which the petitioner also rejected. He said that at that point, he knew it was likely they would be going to trial. He said he then investigated the jury panel, had exhibits prepared, and visited the victim's school.

The attorney testified that on the day before the trial date, the petitioner told him he would not enter a plea agreement and signed a statement reflecting his decision. He said that later that day, he had a court reporter come to his office while he went over the range of punishment, the entire indictment, and the evidence with the petitioner, in order to protect himself from any malpractice claim that may have arisen if the petitioner had gone to trial and received a sentence greater than twelve years, the final offer the state made.

The petitioner's attorney testified that the only mistake he made was waiting until the night before the trial date to sit down and talk to the petitioner with his family. He said that when he played the audiotape of the petitioner's statement for the petitioner's family, they told the petitioner to take the plea offer. He said that the petitioner accepted the state's twelve-year offer that night with his family present and that they contacted the judge to ask if he would accept the plea agreement. He said the judge agreed to accept the pleas but said a jury would be called in for the trial in case the petitioner changed his mind. He said that on the morning of the pleas, he was ready to go to trial in case the petitioner backed out of the plea agreement at the last minute.

The attorney testified that approximately ten days after the guilty pleas, the petitioner told him he was not happy with the pleas. He said he told the petitioner to think about it for a few days because it was unlikely the trial court would allow the pleas to be withdrawn. He said he met with the petitioner a few days later, and they discussed the petitioner's right to pursue post-conviction relief.

On cross-examination, the petitioner's attorney said that he had told the petitioner it was in the petitioner's best interest to accept the plea offer but that he would do whatever the petitioner wanted him to do. He acknowledged that the petitioner wanted to go to trial and wanted to testify until the day before the trial date. He acknowledged the petitioner signed a document the day before the trial date that stated he was not accepting the state's offer.

In denying the petition for post-conviction relief, the trial court found that the pleas were voluntary, knowing, and intelligent and that the petitioner did not receive the ineffective assistance of counsel. The trial court stated:

> I find that the plea was entered knowingly, intelligently and voluntarily. I find that there is no substance to the claim that [the petitioner's attorney] was not prepared for trial. I think he was probably prepared, overly prepared if anything. I believe that he was ready to try the case because as they said, they called me the night before trial. . . . I believe based on the credibility of the witness that there's no factual basis to support the petition for post-conviction relief.

On appeal, the petitioner contends the trial court erred in dismissing his petition for post-conviction relief. He claims he received the ineffective assistance of counsel, which rendered his guilty pleas involuntary and unknowing. The state contends that the trial court properly dismissed the petitioner's petition for post-conviction relief because he voluntarily and knowingly entered his guilty pleas with the effective assistance of counsel.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends he pled guilty because his attorney would not listen to him. The petitioner concedes his attorney's preparation was "competent and in furtherance of the interests of the petitioner" but argues that the petitioner and his attorney did not agree on how to resolve the case. He contends that his attorney's persuading him to enter guilty pleas was not within the range of competence demanded of attorneys in criminal cases and that but for his attorney's deficient conduct, the results of the proceeding would have been different.

The state responds that the trial court properly dismissed the petition because the petitioner knowingly and voluntarily entered his guilty pleas with the effective assistance of counsel. It argues that the petitioner received the effective assistance of counsel because his attorney was prepared to go to trial despite the petitioner's weak case. The state contends that this court is bound by the findings of the trial court because the evidence does not preponderate against the trial court's findings and that the petitioner has failed to demonstrate that his attorney rendered deficient

performance and to show prejudice. The state asserts the petitioner presented no witnesses who were prepared to testify on his behalf and failed to offer any plausible defense theories.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove that counsel performed deficiently and that but for counsel's errors, the petitioner would not have pled guilty and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Baxter, 523 S.W.2d at 936. Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

The trial court found that the petitioner's attorney was a credible witness and was prepared for trial. It stated in its order denying post-conviction relief that

> [The petitioner's attorney] did not render ineffective assistance of counsel at the trial level to the Petitioner. While the Petitioner now asserts that his Trial Counsel was ineffective, on November 17, 2004 when the Petitioner pled guilty, the Petitioner told the court under oath that he had no complaint to make about his Trial Counsel's services.

At the post-conviction hearing, the petitioner's attorney testified that he met the petitioner many times. The attorney testified that he was prepared for trial, that he filed motions to suppress, that he interviewed witnesses, that he worked on jury selection, that he prepared exhibits, that he hired an investigator and a psychiatrist, that he obtained the victim's school records and visited her school, that he deposed the petitioner's ex-wife and gained extensive discovery through the divorce case, and that he and his law partner went over statements with the petitioner. Additionally, the

petitioner concedes that his attorney's preparation was "competent and in furtherance of the interests of the petitioner." We conclude the record does not preponderate against the trial court's findings that the petitioner's attorney's performance was not deficient. The petitioner is not entitled to relief on this issue.

II. GUILTY PLEAS

The petitioner contends he pled guilty because his attorney wanted him to enter pleas and he believed he had no alternative. He argues that his attorney's use of a court reporter, the petitioner's family, and his attorney's affection toward him the day before the trial date "overpowered the will of the petitioner and he believed he had no choice but to accept the State's offer and enter a guilty plea the morning of the trial." He contends his attorney denied him the right to a trial by jury.

The state contends that the petitioner entered his guilty pleas knowingly and voluntarily based on the totality of the circumstances. It argues (1) that the petitioner was intelligent as exhibited by his responses to questions at the post-conviction hearing; (2) that he was familiar with criminal proceedings because he had been investigated in the past; (3) that the petitioner's attorney was a competent and experienced attorney who fully advised the petitioner about his chances at trial, aggressively negotiated on his behalf, and complied with all the petitioner's requests for information and discovery; (4) that the petitioner was advised about the charges against him, advised about the ramifications of the pleas, and offered an opportunity to challenge his attorney's representation; and (5) that the petitioner had a good reason to plead guilty to avoid a greater sentence if he went to trial.

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." Id.

The trial court is charged with determining if a guilty plea is "knowing" by questioning the defendant to insure that he or she fully understands the plea and its consequences. State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999); Blankenship, 858 S.W.2d at 904. In Boykin v. Alabama, the United States Supreme Court stated that certain constitutional rights are implicated in a plea of guilty, namely, the right to a trial by jury, the right to confront witnesses, and the privilege against compelled self-incrimination, and that it would not presume a waiver of these three important rights from a silent record. 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969). Rule 11(c) of the Tennessee Rules of Criminal Procedure outlines advice to be given to a defendant entering a plea and explicit procedures for ensuring on the record that guilty pleas are voluntarily and understandingly made. However, only the constitutionally grounded rights stated in Boykin are addressable, per se, under the Post-Conviction Procedure Act. See State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989).

The petitioner and his attorney testified that the petitioner did not want to plead guilty and wanted to go to trial until the night before he entered his pleas. The petitioner's attorney testified that he was prepared for trial. However, the evening before the trial date, the petitioner decided to accept the state's offer. The transcript of the guilty plea hearing reflects that the trial court asked the petitioner, "Has anyone threatened you, harassed you or coerced you in order to make you plead guilty here today?" The petitioner responded, "No, sir." The transcript also reflects that the trial attorney had no question about the petitioner's competence to enter the pleas, that the petitioner had never been treated for any mental disease or defect, that the petitioner was aware of the range of punishment, that the petitioner had no complaints about his attorney's services, that the petitioner understood the rights he was waiving, and that the petitioner believed it was in his best interest to plead guilty.

Additionally, a form drafted by the petitioner's attorney, which discussed the decision to plead guilty and the rights the petitioner would give up in entering a plea, was admitted as an exhibit at the post-conviction hearing. The petitioner initialed each paragraph of the document and signed the end of the form, including the paragraph that stated "I acknowledge that you have assisted me in making this decision; however, ultimately the decision to plead guilty or not guilty is mine and mine alone." The trial court found that the pleas were entered "knowingly, intelligently and voluntarily." The trial court stated in its order denying relief that "on the date Petitioner pled guilty, Petitioner explicitly stated under oath that no one harassed or coerced him to plead guitly and that he was pleading guilty in his best interests." We conclude that the evidence does not preponderate against the trial court's finding that the guilty pleas were knowing, voluntary, and intelligent, and he is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE